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No. 85-1293

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EDUCATIONAL SERVICES, INC., ET AL.,
Petitioners,

v.

MARYLAND STATE BOARD FOR HIGHER EDUCATION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

I. Did the lower courts properly hold that Maryland's statutory scheme for certifying post-secondary schools is constitutional on its face and was constitutionally applied to petitioners?

II. Did petitioners lack standing to challenge the constitutionality of a Maryland education statute that exempts religious secondary schools from State certification when they hold the required statutory certification?

III. Did the district court properly grant respondents' motion for summary judgment where the parties' cross-motions for summary judgment showed that there was no dispute of material fact and respondents were entitled to judgment as a matter of law?

IV. Did the district court properly review and adopt the Magistrate's report recommending that respondents' motion for summary judgment be granted?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Petitioners Lee Havis and Educational Services, Inc.. (collectively referred to as "Havis") filed a complaint in the United States District Court for the District of

Maryland on September 29, 1981. Havis sued the Maryland State Board for Higher Education, the Maryland State Board of Education and various State officials (hereinafter "Respondents" or "the State"). Havis claimed his constitutional rights were infringed because he was denied a certificate of approval to operate a Montessori teacher training program and because the State has regulatory authority over his proposed tutoring operation, Capital Tutoring, Inc.

Havis was denied a certificate of approval by the Maryland State Board for Higher Education for the operation of an institution of postsecondary education. MD. EDUC. CODE ANN., §12-203(a).[1] After an administrative review process, that lasted approximately one and a half years, a

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[1] Unless otherwise indicated, all statutory references are to the Education Article of the Maryland Annotated Code, copies of which appear at Apx. 4g-10g.

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certificate of approval was denied because the proposed correspondence-style teacher preparation course failed to meet Maryland's standards for postsecondary institutions.

However, the Maryland State Board of Education issued a certificate of approval to Capital Tutoring, Inc., Havis's tutoring service. That certificate is still valid. Despite the fact that Capital Tutoring has a certificate of approval, it has never been operated.

The district court (Howard, J.) granted the State's motion to dismiss based upon the abstention doctrine. On appeal, the United States Court of Appeals for the Fourth Circuit affirmed in part, reversed in part, and remanded for disposition on the merits. Educational Services, Inc. v. Maryland State Board for Higher Education, 710 F.2d 170, 177 (4th Cir. 1983) (Apx. 1d-14d.).

On remand, the case was assigned to the Honorable John R. Hargrove, Judge, who referred the matter to the Honorable Frederic N. Smalkin, United States Magistrate, for a report and recommendation. The parties filed cross-motions for summary judgment. Magistrate Smalkin issued a lengthy report recommending that the State's motion for summary judgment be granted, and that Havis's motion be denied. (Apx. 1e-19e.) Havis filed objections to the recommendation and the State responded. After making a de novo determination, Judge Hargrove adopted the Magistrate's report and recommendation. (Apx. 1f-2f.)

Havis then appealed to the United States Court of Appeals for the Fourth Circuit. The court issued a per curiam unreported opinion affirming the decision of the district court. (Apx. 1a-3a.) The court denied Havis's motion for a rehearing, and this petition followed.

REASONS FOR DENYING THE WRIT

Further review of this case is plainly unwarranted. The present petition fails to present a substantial federal question. Likewise, the petition fails to show that the decisions below are in conflict with the decisions of this Court or with the decision of any circuit court. Indeed, the petition presents no novel or unsettled questions on which the federal courts require the guidance of this Court. The lower courts correctly applied well-settled legal doctrines, including proper deference to the State's authority to regulate education, a matter that is uniquely and acutely a local concern.

I. No Substantial Federal Question is Raised by the Petition.

The Fourth Circuit characterized Havis's complaint as raising two major contentions:

> His principal claim is that the certification powers delegated to the Board under §§12-201, et seq., Ann. Code of Maryland, Education (1982 Cum. Supp.), permit the Board unconstrained discretion to deny certification to unconventional or controversial applicants. Havis's second major contention is that the statutory exemption for religious non public "non-collegiate educational" institutions found in §2-206(e)(4) of the Education Article violates the Establishment Clause because secular non-public schools such as Capital Tutoring remain fully subject to Board certification.

Educational Services, Inc. v. Maryland State Board for Higher Education, 710 F.2d 170, 171-72 (4th Cir. 1983) (Apx. 3d.) (footnotes omitted); Educational Services, Inc. v. Maryland State Board for Higher Education, No. 85-1378, September 30, 1985 (per curiam) (Apx. 2a.) In addition to these constitutional issues, all of which were rejected by the courts below, the present petition raises two procedural questions regarding the district court's decision. The court of appeals did not find these procedural issues worthy of comment.

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A. The lower courts properly decided that Maryland's statutory scheme for regulation of private education is constitutional.

This Court has held that States have the authority to regulate public and private schools. See, e.g., Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236 (1968); Meyer v. State of Nebraska, 262 U.S. 390, 402 (1923). Havis's claim that the discretion vested in administrators by §§12-201, et seq., constitutes an unlawful delegation of authority is without merit. Administrators, especially in the area of education, must have broad discretion to carry out their duties. Board of Education v. Pico, 457 U.S. 853, 863-64 (1982); see generally, Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

The court of appeals and the district court noted correctly that the constitution-

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ality of the statutory scheme at issue has been addressed fully by Maryland's highest court. Schneider v. Pullen, 198 Md. 64, 81 A.2d 226 (1951). The statute is constitutional on its face because the delegation of authority is checked by several levels of review and the statute contains sufficiently definite standards. 198 Md. at 69-70, 81 A.2d at 229. The district court found Schneider to be well-reasoned and entitled to deference. (Apx. at 12e.) Federal court deference to an authoritative state decision on a matter of acute local concern is appropriate. See Moore v. Sims, 442 U.S. 415, 429-30 (1979).

Havis's contention that §§12-201, et seq., was unconstitutionally applied to him in violation of his right to procedural due process is totally lacking in merit. Havis had numerous levels of administrative review as well as the opportunity, which he de-

clined, for judicial review in state court. The issue of the constitutionality of §§12-201, et seq., was correctly decided by the lower courts.

B. The lower courts properly refused to reach the merits of Havis's establishment clause challenge to §2-206(e)(4).

Havis holds a valid certificate of approval to operate his proposed tutoring school. Notwithstanding this fact, Havis asks this Court, as he asked the courts below, to declare unconstitutional the entire State regulatory scheme for private non-collegiate educational institutions. Havis makes this request, even though he holds the statutory certificate, and thus he has no identifiable injury, because §2-206(e)(4) exempts religious schools from regulation. The lower courts correctly declined to reach the merits of this challenge.

Clearly, Havis lacks standing to challenge the constitutionality of §2-206(e)(4). Because he holds a valid certificate, he is free to operate his tutoring service. Therefore, he has no actual injury redressable by the courts. Director, Office of Workers' Compensation Programs v. Perini North River Associates, 459 U.S. 297, 305 (1983); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982).

Havis lacks standing for the further reason that he would not be granted the relief he seeks, exemption from regulation and the abolition of the whole statutory scheme, by a finding that §2-206(e)(4) is unconstitutional. See Warth v. Seldin, 422 U.S. 490, 500 (1975). It is a fundamental principle that the unconstitutionality of a portion of a statute does not render the whole invalid. Buckley v. Valeo, 424 U.S. 1

(1976); Champlin Refining Company v. Corporation Commission, 286 U.S. 210 (1932). In this case, a finding that §2-206(e)(4) is unconstitutional would not exempt Havis from regulation, but would simply eliminate the statute's exemption for religious schools, thereby making those schools, as well as Havis, subject to regulation.

The lower courts properly declined to rule on an issue where petitioner lacked standing and where a declaration of unconstitutionality would not provide him with the relief he seeks.[2]

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[2] In his Petition, Havis seems to indicate that he would be satisfied with a finding that all Maryland schools, private and religious, would be subject to regulation. (Petition at 19, fn. 15). If so, this is an entirely new claim, not raised by the complaint or in any of the courts below.

C. The district court was correct in ruling that respondents were entitled to summary judgment.

The only issues raised by Havis's complaint were issues of law. There were no material facts in dispute. Thus, he moved for summary judgment and the State's motion to dismiss was treated as one for summary judgment. Fed. R. Civ. P. 12(b). The district court correctly found that the case could be decided on the parties' cross-motions. (Apx. at 2e-4e.) For Havis to claim now that this case should not have been decided on the parties' summary judgment motions is without merit, particularly where he filed such a motion claiming that the case presented no dispute as to any material fact.

D. The district court complied with the Magistrate's Act and Fed. R. Civ. P. 72(b) by making a de novo determination of the Magistrate's report and recommendation.

The district court adopted the Magistrate's Report and Recommendation after considering and rejecting Havis's objections (Apx. 1f.) In so doing, the district court fully complied with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b). The de novo determination required by 28 U.S.C. §636(b)(1)(B) and (C) does not require a new trial by the district court. United States v. Raddatz, 447 U.S. 667, 673-76 (1980). The district court is not required to comment specifically on each objection. Such a requirement would burden unnecessarily the district judge, a fact graphically illustrated by the instant case where Havis filed more than forty pages of objections. There is simply no evidence in the record to indi-

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cate that the district court did not consider Havis's objections, and the district court said it did. (Apx. 1f.)

II. The Decisions of the Lower Courts Were in Accord with Prior Decisions of this Court and of Other Federal Circuit Courts.

All issues raised by Havis's petition were decided by the lower courts in accordance with the decisions of this Court. The Petition does not demonstrate that the decisions below are contrary to the applicable decisions of this Court or decisions from other federal circuit courts on similar matters.

III. Further Review by this Court is Unwarranted.

The merits of Havis's claims have been reviewed by a federal magistrate, a federal district court judge, and a panel of the

Fourth Circuit. Throughout this protracted litigation, no merit has been found to any of his claims. Further review is unwarranted.

State education experts determined that one of Havis's school is not qualified to operate in Maryland and granted a certificate to his other school. Detailed reasons were given for the adverse decision. As this Court has stated, education is a function of the state. Board of Education v. Pico, 457 U.S. 853, 863-64 (1982). The federal courts should not make decisions regarding the day-to-day functioning of the State of Maryland's educational system. The courts below correctly reached that conclusion.

CONCLUSION

Respondents respectfully urge the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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